

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1296

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO.
77-1296

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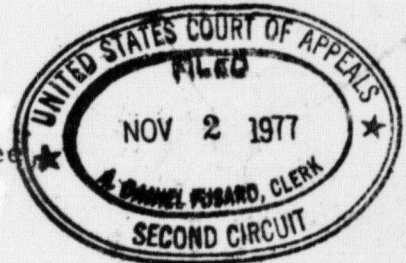
UNITED STATES OF AMERICA,

Appellee

-against-

MICHAEL THISTLETHWAITE,

Defendant-Appellant.



On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT

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IN THE
UNITED STATES COURT OF APPEALS
For The Second Circuit

THE UNITED STATES OF AMERICA,
Appellee,

-against-

MICHAEL THISTLETHWAITE,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT
MICHAEL THISTLETHWAITE

PRELIMINARY STATEMENT

The Appellant, MICHAEL THISTLETHWAITE, appeals from a conviction in the United States District Court for the Eastern District of New York adjudging him guilty of one count of violation of Title 21, U.S.C., Section 846. On September 20, 1977, Appellant was sentenced under the Youth Corrections Act, Section 5010(B). The Appellant was tried before the HON. MARK COSTANTINO, United States District Judge, and a Jury. The defendant is not on bail pending this appeal.

STATEMENT OF FACT

The defendant was indicted for the crime of violating Title 21 U.S.C., Section 846. It was alleged that he conspired with four co-defendants, namely, JOHN MAC FARLAND, ALPHONSE BIFULCO, MARIO BIFULCO and ROSEANN POLIMENI, to manufacture, distribute and possess, etc., a Schedule 3, non-narcotic controlled substance known as phencyclidine. Phencyclidine is commonly known as angel dust. ROSEANN POLIMENI pled guilty prior to trial and testified as a Government witness. MARIO BIFULCO was acquitted after trial. There were two pretrial hearings held. One hearing was a motion to suppress certain items that were seized from an automobile on September 2, 1975. MICHAEL THISTLETHWAITE, ALPHONSE BIFULCO and ROSEANN POLIMENI were passengers in this automobile. This was a State arrest made by the New York City Police Department. The defendant, MICHAEL THISTLETHWAITE does not raise any issue as to the legality of that seizure.

The second pretrial hearing was for a motion to suppress certain admissions made by the defendants. The motion as to MICHAEL THISTLETHWAITE was denied and

heraises the contention that the admissions should . .
not have been introduced into evidence against him.

PRETRIAL EVIDENCE

Police Officer, Paul Kylop, testified that on September 1 and September 2, 1975, he was a New York City Police Officer and arrested three of the defendants, namely, ALPHONSE BIFULCO, ROSEANN POLIMENI and MICHAEL THISTLETHWAITE (R.3). He seized certain narcotic items. In addition, he seized a loaded 38-caliber revolver from ROSEANN POLIMENI's purse (R. 21). There was also a diary seized at that time from ROSEANN POLIMENI (R.23). As I stated before, the appellant, MICHAEL THISTLETHWAITE, does not raise any issue as to the seizure. Officer Paul Kylop was the sole witness to testify for the Government regarding the search and seizure of September 1 and 2, 1975.

The next witness produced by the Government was Drug Enforcement Agent, Joseph DiGennaro. He arrested the defendant, JOHN MAC FARLAND (R. 47).

Reference Key: R - Reference to Minutes.

The next witness produced was Drug Enforcement Agent, Barry Abbott (R. 68). Agent Abbott questioned the defendant in the Drug Enforcement Agency Headquarters. He asked the defendant if he had been advised of his rights. The Agent himself did not advise the defendant of his rights (R. 83). He showed the defendant a list of ingredients for angel dust (R.83) and the defendant admitted that the list was his (R.85). The defendant admitted that he had bought chemicals and that a photograph shown to him was his picture (R.87). The Agent never gave the defendant his Miranda warnings (R. 127).

The next witness produced was Drug Enforcement Agent, Arthur Anderson, who testified that he arrested the defendant, MICHAEL THISTLETHWAITE, about 12:30 A. M. (R. 131, 132). He read him his rights and advised him not to make any statements (R. 133). He was arrested in Queens County and driven to the Drug Enforcement Agency Headquarters. While on the way to the Drug Enforcement Agency Headquarters, on the 59th Street Bridge, the defendant asked the Agent to read the complaint to him. The Agent read the complaint or warrant to the defendant and the defendant replied: "That is the part I do not understand. It says manufacture. I didn't steal anything from anyone." (R. 134,135). Other than

that statement, the defendant didn't talk about anything to do with the investigation. They talked about life (R. 143-145). On the way to the Drug Enforcement Agency Headquarters the defendant made no admissions (R. 146). Agent Anderson delivered the defendant to the Drug Enforcement Agency Headquarters to be questioned by the previous witness, Agent Abbott.

The next witness produced was New York City Police Officer, Edward Verbooks (R. 157). Officer Verbooks testified regarding an arrest of JOHN MAC FARLAND and a seizure from his apartment on July 23, 1976. The appellant, MICHAEL THISTLETHWAITE, was not in the apartment of JOHN MAC FARLAND at the time of said arrest and seizure and he does not raise any issue regarding this question.

The Government rested as to all pretrial hearings.

The defendant, JOHN MAC FARLAND, testified in his own behalf at the pretrial hearing (R. 289). The appellant, MICHAEL THISTLETHWAITE, does not raise any issue regarding his testimony.

TRIAL EVIDENCE

The first trial witness produced by the Government was Lawrence DeMaio (R. 379). In October, 1976, the witness pled guilty in a separate indictment to conspiracy to manufacture and distribute phencyclidine (R. 382). He agreed to cooperate with the Government (R. 383). The Assistant U. S. Attorney agreed to write the sentencing Judge regarding said cooperation (R. 383). The witness was presently residing in a drug rehabilitation center (R.384). He had started to make angel dust in 1973 (R. 387). He had previously sold it (R. 388) and he described how he had made it (R. 389,390).

He met JOHN MAC FARLAND in the late summer of 1975 (R. 391). He discussed making dust with MAC FARLAND (R. 395) and MICHAEL THISTLETHWAITE (R. 396). He drove to Harriman State Park with JOHN MAC FARLAND and MICHAEL THISTLETHWAITE to make grignard (grignard is a necessary ingredient of phencyclidine). A week later, he saw MAC FARLAND and THISTLETHWAITE (R. 403). He went with them to Sproud Lake to make grignard (R. 404). He met at THISTLETHWAITE's apartment (R. 406); MAC FARLAND had given him \$250.00 (R. 409); THISTLETHWAITE told him he knew the formula for angel dust (R. 411); THISTLETHWAITE

told him he met two guys, Mario and Al (R. 414) in December, 1975. He again met THISTLETHWAITE and went with him to an apartment near Alexander's (in Queens County); he met Mario and Al in the apartment; they were brothers (R. 418, 420); they left the apartment and one of the brothers asked the witness and THISTLETHWAITE in a car (R. 441-443).

He again met THISTLETHWAITE (R. 444). He met him later the same week (R. 445) and THISTLETHWAITE told him that Mario and Al wanted five pounds of dust from him plus \$2,000 from him (R. 446). He went to MAC FARLAND's apartment and mixed three pounds of crystals (R. 447). He bought chemicals with THISTLETHWAITE (R. 449).

On cross-examination, he testified to a long history of drug use and abuse (R. 458-460).

In 1975, he was a patient at the Elmhurst General Psychiatric Ward for 16 days (R. 456), and in addition, was in Payne-Whitney Hospital for 29 days (R. 462). He sold drugs (R. 465); in May, 1976, he was in Kings County Hospital Psychiatric Ward for 5 days (R. 544); he admitted lying to Judge Costantino on October 18, 1976, when he pled guilty to a different indictment (R. 551); he admitted

lying to Government representatives (R. 552).

He testified that a party by the name of Joseph Mazzio, who had been indicted with him, the witness' indictment, had pled guilty and was fined \$2,000.00 and received five years' probation' (R. 687).

At this point a hearing was held in the absence of the jury regarding certain photographic identification made by the witness Lawrence DeMaio, and Agent Barry Abbott was called as a witness in this hearing (R. 63). The hearing did not pertain to the defendant, MICHAEL THISTLETHWAITE and he raises no issue regarding said hearing.

At the conclusion of the hearing, the witness, Lawrence DeMaio, returned to the witness-stand for further cross-examination (R. 792).

The next witness produced was ROSEANN POLIMENI (R. 818). The witness had been previously convicted on possession of stolen drugs (R. 819). She had been in a drug rehabilitation center (R. 820). She was a co-defendant in this case (R. 820). and she pled guilty (R. 821). She was a drug user (R. 823-825).

She met ALPHONSE BIFULCO in 1975 (R. 826). She

moved in with him (R. 828) and she and ALPHONSE BIFULCO sold drugs together (R. 832-836).

She met MICHAEL THISTLETHWAITE in the summer of 1975 (R.843). They were arrested September 1, 1975 on the State case (R. 844). She kept a notebook with notes regarding her drug dealings (R. 848). She testified at length about the notes in her diary regarding her drug dealings (R. 853-870).

In December, 1975, she lived with THISTLETHWAITE (R. 871-a). She talked about dust with THISTLETHWAITE (R. 873). She had met MAC FARLAND in 1970 or 1971 (R. 887). In December, 1975, MAC FARLAND came to their apartment and talked to THISTLETHWAITE (R. 889). She bought chemicals with THISTLETHWAITE and MAC FARLAND (R. 890) and she sold dust with THISTLETHWAITE (R. 891). She bought chemicals with ALPHONSE BIFULCO (R. 895).

On cross-examination, she testified to a long history of drug use and sales (R. 913).

The next witness produced by the Government was Police Officer Paul Kylop. He testified substantially the same as he did at the pretrial suppression hearing.

The next witness produced was Mr. Harry Ross (R. 1302). He testified he was the owner of a retail store that sold chemicals and he made an identification of a series of receipts from his store (R. 1302, 1303). THISTLETHWAITE was a customer (R. 1310).

The next witness produced was Emil Balc (R. 317). He testified he was the building superintendent of the building that THISTLETHWAITE lived in (R. 318). He had smelled ether coming from the defendant's apartment (R. 1325).

The next witness produced was Police Officer Edward Verbooks (R. 1327). He testified only regarding the defendant, JOHN MAC FARLAND.

The next witness produced was Drug Enforcement Agent, Ronald Catanese (R. 1346). He testified that he was across from Berg Chemical Company on August 4, 1976, and took certain photographs of customers of the Berg Chemical Company (R. 1347). The photographs were admitted into evidence (R. 1348).

The next witness produced by the Government was Neville James (R. 1349). He was employed by Berg Chemical Company and identified records of Berg Chemical (R. 1351).

The next witness produced by the Government was Drug Enforcement Agent, Joseph DiGennaro (R. 1361). He testified as to the arrest of JOHN MAC FARLAND (R. 1362) and that he assisted in the arrest of the defendant BIFULCO (R. 1366).

The next witness produced by the Government was Drug Enforcement Agent, Arthur Anderson. He testified that about 12:30 A. M. on January 5, 1977, he arrested the defendant and took him to Drug Enforcement Agency Headquarters (R. 1379).

The next witness produced by the Government was Drug Enforcement Agent, Barry Abbott (R. 1395). He testified the defendant was arrested on January 5, 1977; that he saw him some time after midnight (R. 1403). The defendant admitted that the signature on certain lab receipts was his (R. 1406) and that photographs that were taken were photographs of him (R. 1406). He admitted that certain papers that were seized in the September 1 and 2, 1975 State arrest were his (R. 1408).

The next witness produced by the Government was Mr. William Phillips. Mr. Phillips was a chemist from the Drug Enforcement Agency. He testified as to the necessary ingredients of phencyclidine (R. 1440).

Mr. Phillips was the last witness produced by the Government.

Each defendant rested on the conclusion of the Government's case. None of the defendants called any witnesses in their own behalf.

POINT I

IT WAS ERROR FOR THE TRIAL COURT TO
ADMIT INTO EVIDENCE THE ADMISSIONS
MADE BY THE DEFENDANT

The Agent who elicited the admission from the defendant never advised the defendant of his Miranda rights (R. 127). Agent Arthur Anderson, who first arrested the defendant, read him his rights and advised him not to make any statements (R. 133). There is nothing in the record to indicate that the defendant understood any of his Miranda rights or that he waived his Miranda rights. The record affirmatively shows that the defendant did not understand the proceedings against him shortly after he was read his Miranda rights. When Agent Anderson read the complaint to him on the way to the Drug Enforcement Agency, the defendant replied: "That is the part I do not understand. It says manufacture. I didn't steal anything from anyone." (R. 134,135). This

statement was completely unresponsive and unrelated to the reading of the complaint. The defendant was placed in custody at about 12:30 A. M. (R. 132).

A heavy burden rests upon the Government to prove that a person in custody knowingly and intelligently waived the privilege against self-incrimination and his right to retained or appointed counsel. The Government, in the case at bar, has not met this heavy burden. A waiver should be an intentional relinquishment or abandonment of a known right or privilege. There is nothing in this record that would show such an intentional relinquishment or abandonment of the defendant's right to counsel.

It is respectfully submitted that the courts should indulge every reasonable presumption against a defendant's waiver of fundamental constitutional rights. The records should show an intelligent and competent waiver by the defendant. The record is completely bare of any showing of such intelligent and competent waiver. The facts and surrounding circumstances clearly demonstrate that the defendant never waived his Miranda rights.

The conduct of the defendant would demonstrate that he was completely confused as to the proceedings. As

outlined above, when he was read his arrest warrant, he replied that he did not steal anything from anyone. Needless to say, there was never any question that the defendant was accused of a larceny. The Government's case was completely devoid of waiver by the defendant.

The defendant relies upon the case of Miranda v. Arizona, 384 U. S. 436 and also Johnson v. Zerbst, 304 U. S. 458.

POINT II

IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO DECLARE A MISTRIAL WHEN ONE OF THE WITNESSES TESTIFIED THAT ANOTHER DEFENDANT HAD BEEN SENTENCED TO PAY A FINE OF \$2,000 AND 5 YEARS' PROBATION

Lawrence DeMaio testified that one, Joseph Mazzio, who had been indicted with him, had pled guilty and that he was fined \$2,000 and received five years' probation (R. 687). Prior to this testimony, at a side bar conference, counsel for all of the defendants argued long and strenuously that the Prosecutor should not be permitted to go into this area in his redirect examination of the Government witness, Lawrence DeMaio. Immediately upon Lawrence DeMaio testifying that another party in a similar case had received a fine and probation,

counsel for the defendant moved for a mistrial (R. 687,688). Although the Trial Judge attempted to rectify this error by instructing the Jury that punishment was not to be considered by them, it would be impossible for any trial juror to strike this from their minds.

It was highly prejudicial for the Trial Jury to hear that a party involved in the same type of an indictment was simply fined and received probation. Once having heard that testimony, they would have no alternative but to feel that if, in fact they convicted these defendants, they would receive the same sentence. No defendant can receive a fair trial when the Trial Jury hears that another party in a similar case has merely been fined and been sentenced to probation. No limiting instruction by the Judge could rectify this error. This error was compounded by the fact that counsel for all of the defendants, prior to the testimony, had attempted to restrain the Prosecutor from questioning along this line. The questions as posed by the Prosecutor could only elicit the answer that the witness gave him.

The questioning by the Prosecutor and the answers given were as follows:

Q Mr. DeMaio, Joseph Mazzio was indicted with you?

A Yes.

Q Do you know what happened with his case?

A Yes.

Q What?

A He got fined \$2,000 and five years probation.

Q He pleaded guilty?

A Yes.

THE COURT: No, no.

MR. GREEN: Now, Judge, at this time, I respectfully move for the withdrawal of a juror and the declaration of a mistrial.

MR. QUAGLIATA: I join in the motion.

MR. GREEN: Based on the question and the answer.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE JUDGMENT
OF CONVICTION SHOULD BE REVERSED AND A NEW
TRIAL SHOULD BE GRANTED.

Respectfully submitted,

ROBERT E. GREEN
Attorney for Defendant-Appellant
MICHAEL THISTLETHWAITE

TO: HON. DAVID TRAGER
U. S. Attorney,
Eastern District of New York
225 Cadman Plaza
Brooklyn, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff

against

MICHAEL THISTLETHWAITE,

Defendant

~~XXXXXX~~

Docket No. 77-1296

PROOF OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF QUEENS,

ss.:

The undersigned, attorney at law of the State of New York affirms: }
~~being duly sworn, deposes and says~~ } that deponent is
 attorney(s) of record for

MICHAEL THISTLETHWAITE

~~Deponent is not a party to the action, is over 18 years of age and resides at~~

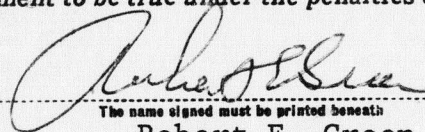
That on the 1st day of November, 19 77 deponent served the annexed
 BRIEF

on Hon. David Trager,
 attorney(s) for Plaintiff
 in this action at 225 Cadman Plaza East, Brooklyn, N. Y.
 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
 in a postpaid properly addressed wrapper, in ~~at post office~~ official depository under the exclusive care
 and custody of the United States post office department within the State of New York.

(The undersigned attorney affirms the foregoing statement to be true under the penalties of perjury.)

Sworn to before me (Dated:)

this 1st day of November, 1977



The name signed must be printed beneath

Robert E. Green

~~Index No.~~ DOCKET NO. 77-1296
U. S. COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff

against

MICHAEL THISTLETHWAITE,

Defendant

**AFFIDAVIT OR AFFIRMATION
OF SERVICE**

